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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 123

MANUAL ENTERPRISES, INC.,
A body corporate

TRUTH ENTERPRISES, INC.,
A body corporate

GRECIAN GUILD,
A body corporate

Appellants,

v.

J. EDWARD DAY,
Postmaster General of the United States

Appellee.

BRIEF OF APPELLANT

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BRIEF OF APPELLANT

REFERENCE TO THE OPINIONS BELOW

The Order of the United States District Court for the District of Columbia denying motion for preliminary injunction and plaintiffs' motion for summary judgment and granting defendant's motion for summary judgment appears in the Record at page seventy-eight. Judgment of the United States Court of Appeals for the District of Columbia confirming the Order of the United States

District Court for the District of Columbia appears in the Record on page ninety-three and the opinion of that Court appears in the Record at page ninety.

JURISDICTION

The United States District Court for the District of Columbia had jurisdiction over this case. The decision and judgment of the United States Court of Appeals for the District of Columbia was entered March 23, 1961. The jurisdiction of this Honorable Court is invoked under Title 28 U. S. Code Section 1254. This Court granted the Petition for Writ of Certiorari on October 9, 1961.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

Constitution of the United States

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Statute Involved

18 U.S.C. 1461 provides, in pertinent part:

18 U.S.C. § 1461. Mailing obscene or crime-inciting matter.

> Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and—
>
> • • • •
>
> Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, or where or by whom any act or operation of any kind for the procuring or producing of abortion will be done or performed, or how or by what means conception may be prevented or abortion produced, whether sealed or unsealed; and
>
> • • • •
>
> Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.
>
> Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.
>
> • • • •

QUESTIONS PRESENTED FOR REVIEW

1. Whether the appellants' magazines are obscene within the literal meaning of Title 18, United States Code, Section 1461, and if the appellants' magazines were found to appeal to the prurient interest of homosexuals, whether appellants' magazines would come under the protection of the First Amendment to the Constitution of the United States of America.

2. Whether appellants' magazines are non-mailable as containing advertisements of where, how, from whom, and by what means obscene material may be obtained in violation of Title 18, United States Code, Section 1461.

3. Whether the appellee, through the Post Office Department procedures, exercised an unconstitutional prior restraint upon appellants' magazines in violation of the First and Fifth Amendments to the Constitution of the United States of America.

STATEMENT OF THE CASE

Appellants are the corporate owners of three magazines, "Manual", "Trim" and "Grecian Guild Pictorial". On April 5, 1960 the General Counsel of the Post Office Department, ex parte, determined these three magazines to be obscene and non-mailable and withheld from transit through the mails 255 copies of the April, 1960 issue of "Manual," 75 copies of the May, 1960 issue of "Trim" and 75 copies of the May, 1960 issue of "Grecian Guild Pictorial." These magazines were held by the Postmaster in Alexandria, Virginia. Thereafter, appellants forced the Post Office to hold a formal hearing on the question of whether or not these magazines were mailable by obtaining a Temporary Restraining Order from the United States District Court for the District of Columbia. The General Counsel for the Post Office Department on April 14, 1960 filed a complaint with the Judicial Office of the

Post Office Department alleging that the three magazines were obscene and non-mailable and also that the magazines contained advertisements where, how, and from whom obscene matter may be obtained and therefore were non-mailable. To expedite the administrative procedures, appellants stipulated to waive the hearing before a Post Office Department Hearing Examiner and consented to the Post Office Department Judicial Officer presiding at the hearing. The hearing was held at the Post Office Department April 21, 1960 through April 25, 1960. The Post Office Department Judicial Officer agreed with the General Counsel of the Post Office Department and held the several issues of the appellants' magazines to be obscene and non-mailable and further to be non-mailable as containing advertisements as to where, how, and from whom obscene materials could be obtained, all in violation of Title 18 U. S. C. Section 1461. At the Post Office Department hearing both parties produced psychiatrists and psychologists, all of whom agreed that appellants' magazines would not appeal to the prurient interest of the average members of the community, (Record, pages forty-two, forty-three, forty-seven, and forty-eight). No witness was qualified as an expert on body building, physical therapy or physical culture and all admitted ignorance of these matters, (Record, pages twenty-five, twenty-eight, forty-three, forty-four), except Dr. Link, (Record, pages forty-eight, fifty-two, fifty-three). The Post Office Department psychiatrist testified that different photographs in each of appellants' magazines, along with a myriad of other every day stimuli, could appeal to the prurient interest of different types of homosexuals, (Record, pages twenty-one through twenty-three). He also admitted that the photographs in appellants' magazines were less revealing than the totally nude photographs which appear in several issues of "Sunshine and Health" nudist magazines, and other magazines as "Playboy", (Record, pages twenty-three, twenty-four, twenty-eight).

The Post Office Department attempted to prove that appellants' publisher had made statements that the three magazines at issue were sold to homosexuals. Further, the Post Office Department attempted to prove to its Post Office Department Judicial Officer that some of the photographers contributing to appellants' magazines advertised where, how, and from whom obscene matter could be obtained. This was accomplished by introducing obscene photographs seized from the homes and offices of the different photographers, but not obscene photographs which were sold through the mails by the different photographers. The Postal Inspector testified that he had difficulty in purchasing any obscene photographs from any photographer listed in appellants' magazines when responding to an advertisement from appellants' magazines, (Record, page fifty-seven). He further testified that appellants' publisher had offered to delete the works of any contributing photographer to appellants' magazines upon being notified by the Postal Inspector that said photographer had been convicted of any criminal offense, (Record pages fifty-eight thru sixty-two). There was no direct testimony concerning the method of distribution of appellants' magazines, (Record, page sixty-three). The Post Office Department Judicial Officer was unconcerned with what materials would constitute the contemporary community standards in the magazine field and would not permit examination of the psychiatrists as to the effect of other magazines, generally accepted in the community and comparable to appellants' magazines at issue, upon other sexual deviates and particularly susceptible groups of readers, (Record, pages twenty-eight, thirty, thirty-one). On April 28, 1960 the Post Office Department Judicial Officer rendered his Departmental Decision, (Record, page seventy-nine), holding appellants' magazines to be non-mailable and on May 13, 1960 appellants filed their Complaint and Motion for Preliminary Injunction in the United States District

Court for the District of Columbia, (Record, pages sixty-six through seventy-one), which resulted in that Court's Order, (Record page seventy-eight), granting summary judgment to the respondent on August 17, 1960 from which an appeal was taken, (Record, page seventy-nine).

The United States Court of Appeals for the District of Columbia Circuit on March 23, 1961 entered its decision and opinion, (Record pages ninety thru ninety-three), affirming the action of the United States District Court for the District of Columbia Circuit.

Thereafter appellants' petitioned this Court to grant a Writ of Certiorari to the United States Circuit Court of Appeals for the District of Columbia.

SUMMARY OF ARGUMENT

Appellants' magazine were judged obscene upon the Government's psychiatric testimony. Factually, appellants' magazines were not considered as a whole and were not judged according to the tests set down by this Court in its definition of obscenity in the case of *Roth* v. *United States*, 354 U.S. 476. The Post Office Department adopted its own definition of obscenity, which definition is inherently vague and indefinite. The Post Office Department erroneously uses the term "homosexual" to describe a class of people when the term "homosexual" actually describes activities, and psychic reactions, rather than persons and there could be no magazine appealing to the prurient interests of "homosexuals". Assuming, *arguendo*, that the Post Office Department's definition of obscenity is valid, then appellants' magazines are to be considered as pin-up photographs for "homosexuals" and, as such, appellants' magazines are still constitutionally protected. Appellants magazines are physique magazines, intended to stimulate physical culture, a desirable purpose, and as such, are constitutionally protected.

Appellants' magazines did not give information, where, how, from whom, and by what means obscene material may be obtained, and if obscene materials could be obtained from the contributing photographers and and advertisers in appellants' magazines, then appellant had no knowledge of this situation and took all reasonable measures to avoid giving information where, how, from whom, and by what means, obscene material may be obtained. Appellants' magazines are not obscene and are suitable for transit through the mail.

A magazine publisher, without knowledge of the unknown actions of the contributing photographers and advertisers in the publisher's magazine cannot be held responsible for said actions of the contributing photogarphers and advertisers when all reasonable means of ascertaining the nature of the advertisers' products have been exhausted.

The administrative procedures adopted and practiced by the Post Office Department constitute an unlawful prior restraint. Their effect is to censor from transit through the United States Mails any dated magazine which might be considered distasteful to the Post Office Department.

ARGUMENT

POINT ONE

Whether the Appellants' Magazines Are Obscene Within the Literal Meaning of Title 18, Section 1461, United States, Code, And If The Appellants' Magazines Were Found To Appeal To The Prurient Interest Of Homosexuals, Whether Appellants' Magazines Would Come Under The Protection Of The First Amendment To The Constitution Of The United States Of America

So far as issues Number One and Two are concerned, the statutory and constitutional questions coalesce. This Court in *Roth* v. *United States,* 354 U.S. 476, sustained

pertinent Code Section 18 U. S. Code 1461, prior to its Amendment, on the ground that obscenity lies outside the protection of the constitutional guarantees of the First Amendment. The Court, in that case, thoroughly defined "obscenity." The ambit of the statute, then, cannot constitutionally be broader than the Court's definition of obscenity. Of course, the statute is to be interpreted as broadly as the Constitution allows. In the administrative hearing before the Post Office Judicial Officer, it was allegedly the magazines on trial. The affidavit of Herman L. Womack (Record P. 71), in support of the motion for temporary injunction herein, must be considered in relation to the transcript of the proceedings held at the Post Office (Record page sixty-three). In the *Roth* case, the Court defined obscenity in terms of what it is, and in terms of what it is not. The expression of ideas that have the "slightest redeeming social importance" was held by this Court to be constitutionally protected. To be obscene, therefore, these magazines must be empty of any ideas of even the slightest redeeming social importance. This Court must conclude that physique magazines, also popularly termed body building magazines, have significant social importance to a large segment of the population of the United States.

Further, this Court in defining obscenity, carefully laid down its mandate that the questioned material must be considered as a whole. We have four magazines in evidence. The relevant testimony as to each magazine is hereinafter analyzed:

A—*Analysis of the Exhibits Tested by the Standards Set Forth by this Court in the Definition of Obscenity*

Exhibit I, April 1960 Issue of Manual Magazine
(Admitted in evidence, Record page four)

The Post Office expert witness, Dr. Frank Caprio, in his entire testimony relating to this Exhibit, referred to photographs appearing on 16 pages of this Magazine,

which consists of a total of 48 pages, mathematically one-third of the entire text. His testimony regarding the photographs on pages 2 and 3 and 8 and 9 of Exhibit I, appears in the record on page six. Apparently, the doctor has no quarrel with the photographs apearing on pages 8 and 9 of the magazine whereas his objection to the photographs on pages 2 and 3 is based upon the model's appearing in a posing strap and the depiction of small amounts of pubic hair on the model. The doctor, in his analysis of these photographs gave no consideration to the overall physical development of the model or to any other features of the photographs. Again, the doctor in referring to the photograph on page 12 of Exhibit I gives absolutely no consideration to the physical development of the model (Record, page six). The doctor's testimony that such a photograph would have a special appeal to a homosexual because of the nudity of the model is incredible, since the photograph does not in any way expose any genital area of the model, and is absolutely lacking in sexually stimulating features. In the doctor's consideration of the photographs appearing on pages 18 and 19 of Exhibit I (Record page six), the complaint of the witness was that the genitals were not exposed, without any consideration to the physical development of the models depicted or consideration of the many other features of the photographs taken as a whole. The photographs appearing on pages 18 and 19 of Exhibit I are comparable and similar to a myriad of photographs appearing in other magazines wherein a prop or object is used to cover the genital region, and the particular type of prop or object used to cover the genital region must vary, else all of the photographs would be identical and uniform without allowance for artistic ingenuity of the photographer. Upon an unprejudiced viewing of pages 18 and 19 of Exhibit I, without a preconceived opinion, the viewer must conclude that both photographs depict extremely well-developed models with enviable physiques.

Is that not one of the purposes of a body-builders' magazine—to depict the physique an under-developed viewer would desire to attain?

Referring to Exhibit I, the photographs appearing on pages 20, 22, and 23 (Record, pages six, seven), the witness again complains of the use of posing straps to cover the genital area and, as to page 23, to the model's wearing boots. There again, the witness gave no consideration to the excellent physical development of the models depicted on pages 20, 22, and 23, nor did the witness consider the photographs as a whole. Certainly, any unbiased viewer of these pages 20, 22, and 23 of Exhibit I, must conclude that the dominant theme of the photographs considered as a whole, is a depiction of extremely well developed models, whose physical development, without an ounce of excess flesh, would be, to an average person, enviable.

Referring to the centerfold photograph, pages 24, and 25 of Exhibit I, (Record page seven), the witness, in considering the photograph only took notice of the buttocks of the model. Certainly, an unbiased viewer of the centerfold pages, considering the photographs as a whole, must come to the conclusion that the dominant theme of that photograph is the tremendous muscle development of the model's arms, shoulders and back and the artistic portrayal by the photographer of the model ripping asunder a black wall. Further, in consideration of the lighting used by the photographer, the buttock area is de-emphasized by shadows, whereas the shoulder area is high-lighted Referring to the photographs appearing on pages 30 and 31 of Exhibit I, (Record page eight), the witness again gives no consideration to the physical development of the model depicted, makes no consideration of the photographs as a whole, and simply describes same as "suggestive." In what other manner could a photographer pose his model to so clearly outline the muscular development of the model's legs? Are not the photographs

appearing on pages 30 and 31 of Exhibit I, ideal for use of an artist concerned with figure drawing? Referring to page 35 of Exhibit I, the witness's complaint again is directed towards the type of prop used to cover the genital area without any consideration for any of the other features of the photograph considered as a whole, and completely disregarding the physical, muscular development of the model depicted. (Record page eight). Again, referring to page 36 of Exhibit I, (Record page, eight) depicting an extremely well developed model sunbathing, the witness gives no consideration to the muscular development of the model whose biceps muscles of the arms and legs are the predominant theme of the photograph, with the buttocsk to which the witness adverts, being almost totally obscured by shadow. Again referring to the use of posing strap, (Record pages eight, nine), on page 39 of Exhibit I, the witness gave no consideration to the tremendous physical development of the model. The muscular development of the model's arms, chest and stomach, as accentuated by the poses of the model, certainly would be the dominant theme of the photographs, to an unbiased viewer. There is no necessity that all exercises be performed inside the confines of stuffy gymnasiums and the witness's comments on the shrubbery background of the photographs are nothing less than ridiculous.

Referring to the three advertisements on page 45 of Exhibit I, (Record page nine), the witness again completely overlooks the muscular development of the models depicted.

The Post Office expert witness in psychiatry who is not qualified in any field relating to physical development or body building, (Record pages twenty-five, twenty-eight), at no time in any of his testimony gave consideration to the textual material as it appears in Exhibit I.

Exhibit II, May 1960 Issue of Trim Magazine

(Admitted in evidence, Record page four)

The Post Office expert witness, Dr. Frank Caprio in his entire testimony relating to this Exhibit referred to six pages out of forty eight, or mathematically one-eighth of the total context of the magazine. In commenting upon photographs appearing on pages 18 and 19 of this Exhibit, (Record page twelve), he considered the same as depicting a strip tease. An examination of page 19 shows an extremely well developed model holding a prop to cover the genital region. Certainly, the dominant theme of this photograph considered as a whole, with highlights and shadows, is to the model's chest and shoulders and away from any other region. In commenting upon the photographs appearing on pages 34 and 35 of this Exhibit (Record page twelve), the witness's objection goes to the use of chains, in these two classic dynamic tension poses of models with extremely well developed physiques. The poses of the model on pages 34 and 35 are comparable to the illustrations of Charles Atlas, which appeared in magazines all over the world for many years. The witness, in his entire testimony, gave no consideration to the excellent physical development and body building features depicted in all of the other photographs in this magazine.

Exhibit III, May 1960 Issue of Grecian Guild Pictorial

(Admitted in evidence, Record page four)

The Post Office expert witness, Dr. Frank Caprio, in his entire testimony relating to this exhibit, referred to five pages out of forty eight, or mathematically less than one-eighth of the total context of the magazine. Referring to pages 8 and 9 of this exhibit, (Record pages fourteen, fifteen), the witness emphasized the use of a sword and a chain as a prop. These photographs were illustrating the article "Prometheus" (Exhibit III, page 8) of which

the witness confessed complete ignorance, (Record page thirty-two). Referring to the photograph on page 14 of this Exhibit, (Record page fifteen), the witness testified that the glass held in the model's hand was analogous to the power symbol of a gladiator. A consideration of this photograph taken as a whole, would indicate the model depicting an athlete resting while reading a book containing pictures of nude females, a subject which could not be more distasteful to a male homosexual, and again the witness gave no consideration to the physical development of the model. In referring to the legend of the magazine as it appears at the top of page 2 of Exhibit III, (Record page sixteen), the doctor concludes that the mere use of the name "Grecian Guild Pictorial" brands this Exhibit III as a magazine for homosexuals. In all of the witness's testimony no consideration is given to the textual material contained in this magazine.

Exhibit IV, March 1960 Issue of Trim Magazine

(Admitted in evidence, Record page four)

The Post Office expert witness Dr. Frank Caprio, in his entire testimony relating to this Exhibit referred to four pages out of forty eight, or mathematically, one-twelfth of the total context of the magazine. Referring to page 30 of this Exhibit, (Record page seventeen), the witness's testimony was that the model's genital area was emphasized. Considering this photograph as a whole in conjunction with the photographs of the same model appearing on the preceding two pages, 28 and 29, this is a ridiculous assumption. In the testimony given by this witness relative to the other Exhibits, the chief complaint was in the use of posing straps as against preferred photographs of models wearing short pants or trunks. This series of photographs depicts four views of the model in short pants, which the Post Office Department attempts to label as pornographic. The dominant theme of the photograph on page 30 is not the model's pants

but it is rather clear cut to an impartial viewer, a photograph of a hunter with bow and arrows resting in a tree fork. Again, referring to the photographs on pages 32 and 33, (Record page eighteen), the witness's objection is to the use of the internationally famous bikini bathing suit, without any consideration being given to any of the other features of the photographs. It is immediately apparent that no kind of covering of the model's genital area would satisfy the Post Office Department. Again, referring to page 39 of this Exhibit, (Record page eighteen), the witness's complaint refers to the model's wearing of a short bathing suit as compared with the models appearing on page 38, wearing dungarees or levis, incorrectly described as tight sailor's trunk pants by the witness. Yet the same witness admitted, (Record page twenty-three), that none of the photographs in any of the Exhibits depict a model wherein the male sex organ is apparent. And again, the witness gives no consideration to the physical development of any of the models whose photographs appear in this Exhibit.

In summarizing all of the exhibits only one conclusion may be reached and it is that each of the magazines is a physique magazine as recognized by the United States Court of Appeals for the District of Columbia in its opinion, (Record page ninety), comparable to every other physique magazine sold in the United States, (Record pages twenty-eight, twenty-nine).

B—*The Post Office Department's Definition of Obscenity Is Inherently Vague and Indefinite*

This brings us to an analysis of the Post Office Department's interpretation of this Court's ruling, and definition of obscenity, as set forth in the case of *Roth* v. *United States*, 354 US 476. Exactly what is this so-called homosexual audience composed of? Is the word "homosexual" synonymous with the term "sexual psychopath"? There is no basis for the assumption that all homosexuals are

psycho-biologically predisposed to commit prohibited sexual acts with other males or that they thus necessarily are sex perverts. There would be no more basis to assume that every so-called hetero-sexual male is predisposed by his psycho-biological make-up to commit rape. The *Official Report of the Departmental Committee on Homosexual Offenses and Prostitution, United Kingdom, Home Office and Scottish Home Department, 1957*, states at page 12:

> "It must not be thought that the existence of the homosexual propensity necessarily leads to homosexual behavior of an overtly sexual kind. Even where it does this behavior does not necessarily amount to a homosexual offence; for instance, solitary masturbation with homosexual fantasies is probably the most common homosexual act."

The term "homosexual" as used to describe a class of people is, of course, a misnomer and has no real or useful significance. This use of the word is really the product of popular misapprehension and prejudice. There is, in truth, no definitely definable and distinct group of human beings classifiable as "homosexuals" set apart from the rest of the population, nor is the word "hetero-sexual" a proper description of a class of people. The two expressions describe activities and psychic reactions, rather than persons. It must be understood that "homosexual" is not a characteristic of a small, isolated, group of people, but is a type of sexual activity or propensity which directly affects and occurs in the lives of vast proportions of our population. Professor Kinsey in his "*Sexual Behavior In The Human Male*" and "*Sexual Behavior In the Human Female*" makes the following observations:

> ". . . there is only about half of the male population whose sexual behavior is exclusively heterosexual, and there are only a few percent who are exclusively homosexual. Any restriction of the term homosexuality to individuals who are exclusively so demands,

logically, that the term heterosexual be applied only to those individuals who are exclusively heterosexual; and this makes no allowance for the nearly half of the population which has had sexual contacts with, or reacted psychically to, individuals of their own as well as of the opposite sex. Actually, of course, one must learn to recognize every combination of heterosexuality and homosexuality in the histories of various individuals."

"*Sexual Behavior in the Human Male*", pp. 616-617.

"There are some persons whose sexual reactions and socio-sexual activities are directed only toward individuals of their own sex. There are others whose psychosexual reactions and socio-sexual activities are directed, throughout their lives, only toward individuals of the opposite sex. These are the extreme patterns which are labeled homosexuality and heterosexuality. There remain, however, among both females and males, a considerable number of persons who include both homosexual and heterosexual responses and/or activities in their histories. Sometimes their homosexual and heterosexual responses and contacts occur at different periods in their lives; sometimes they occur coincidentally. This group of persons is identified in the literature as bisexual.

"That there are individuals who react psychologically to both females and males, and who have overt sexual relations with both females and males in the course of their lives, or in any single period of their lives, is a fact of which many persons are unaware; and many of those who are academically aware of it still fail to comprehend the realities of the situation. It is a characteristic of the human mind that it tries to dichotomize in its classification of phenomena. Things either are so, or they are not so. Sexual behavior is either normal or abnormal, socially acceptable or unacceptable, heterosexual or homosexual; and many persons do not want to believe that there are gradations in these matters from one to the other extreme."

"*Sexual Behavior in the Human Female*", pp. 468-469.

It is, therefore, a problem, even in the medical profession, to define a person as a homosexual, rather than defining an activity as homosexual. There are individuals who carry out homosexual acts who psychologically are not homosexuals. That is the individual who might do this act for money, with no desire whatsoever of a sexual nature to commit the act. In that sense, psychologically, he is not homosexual. If, in defining the term homosexual, there would be included any individual who has some latent homosexual tendencies within him, then, all persons would be classified homosexuals, since all persons have to some degree latent homosexual tendencies within them. If, in defining the term "homosexual" it would be limited to individuals who have actually carried out overt homosexual acts, then the term would be synonymous with "sexual psychopath".

In "*Problems Of Homosexuality*" at pp. 3 and 4, Dr. Norman Reider makes the following comments:

> "Whom shall we consider the homosexual? Shall we consider all of the thirty-seven percent of males who have had at least one homosexual contact? Shall we consider only four percent whose sexual outlets are only through homosexual activity? If we adopt a definition which contains some extraction of this one extreme or the other we lose sight of the fact that there is a gradation of sexual activity, interest and preoccupation which flows from one extreme to the other. We would be losing sight of the fact that there is a historical and developmental approach to the problem which tends to show that each of us has both biological and psychological roots for homosexuality. The biological roots are clear, that there is a phase in our ontogenetic development in which we are the objects of tenderness, affection, abuse, and cruelty at the hands of both men and women. Our destinies are shaped out of so many factors which

> come out of our past histories that to try to make the problem of homosexuality from an etiological point of view a simple one, is just not facing the facts. There are those who would like to say that it is simply a matter of constitution and biochemistry. Unfortunately, our knowledge to this point fails to show what the essential difference is in either the constitution or the biochemistry between the homosexual and the heterosexual. A much greater accumulation of evidence stands to show that environmental and developmental factors do more to shape the avenue in which we will seek our sexual outlets than anything constitutional. But at the same time I can very easily say that those who are doing research in this field have only begun to unravel the mysteries involved."

Therefore, an individual should be considered homosexual only if he indulges exclusively in these practices. The existence and extent of latent homosexuality exists in all persons because of their bi-sexual constitution.

Professor Kinsey also distinguished between overt homosexual experiences, involving orgasm, and psychic reactions, which do not involve physical contact (see *Report on the Male*, p. 623). The results of his studies in this connection are stated in his "*Report on the Male*", pp. 638-655, as follows:

> "The histories which have been available in the present study make it apparent that the heterosexuality or homosexuality of many individuals is not an all-or-none proposition. It is true that there are persons in the population whose histories are exclusively heterosexual, both in regard to their overt experience and in regard to their psychic reactions. And there are individuals in the population whose histories are exclusively homosexual, both in experience and in psychic reactions. But the record also shows that there is a considerable portion of the population whose members have combined, within their individual histories, both homosexual and heterosexual experience and/or psychic responses. There are some whose

heterosexual experiences predominate, there are some whose homosexual experiences predominate, there are some who have had quite equal amounts of both types of experiences.

"Some of the males who are involved in one type of relation at one period in their lives, may have only the other type of relation at some later period. There may be considerable fluctuation of patterns from time to time. Some males may be involved in both heterosexual and homosexual activities within the same period of time.

"Males do not represent two discrete populations, heterosexual and homosexual. The world is not to be divided into sheep and goats . . . The sooner we learn this concerning human sexual behavior the sooner we shall reach a sound understanding of the realities of sex.

"While emphasizing the continuity of the gradations between exclusively heterosexual and exclusively homosexual histories, it has seemed desirable to develop some sort of classification which could be based on the relative amounts of heterosexual and of homosexual experience or response in each history." (pp. 638-639).

For this purpose, Professor Kinsey devised a "heterosexual-homosexual rating scale" on which

"Based on both psychologic reactions and overt experience, individuals rate as follows:

"0. Exclusively heterosexual with no homosexual.

1. Predominantly heterosexual, only incidentally homosexual.
2. Predominantly heterosexual, but more than incidentally homosexual.
3. Equally heterosexual and homosexual.
4. Predominantly homosexual, but more than incidentally heterosexual.
5. Predominantly homosexual, but incidentally heterosexual.

6. Exclusively homosexual." (p. 638)

"It will be observed that the rating which an individual receives has a dual basis. It takes into account his overt sexual experience and or his psychosexual reactions." (p. 647).

Professor Kinsey presents us with the following statistics in his "*Report On The Male*":

"37 percent of the total male population has at least some overt homosexual experience to the point of orgasm between adolescence and old age (Figure 156).

This accounts for nearly 2 males out of every 5 that one may meet.

"50 percent of the males who remain single until age 35 have had overt homosexual experience to the point of orgasm, since the onset of adolescence (Figure 156)." (pp. 647-650).

"13 percent of the males (approximately) react erotically to other males without having overt homosexual contacts after the onset of adolescence.

"30 percent of all males have at least incidental homosexual experience or reactions (i.e., rate 1 to 6) over at least a three-year period between the ages of 16 and 55. This accounts for one male out of every three in the population who is past the early years of adolescence (Table 150, Figure 168).

"25 percent of the male population has more than incidental homosexual experience or reactions (i.e., rates 2-6) for at least three years between the ages of 16 and 55. In terms of averages, one male out of approximately every four has had or will have such distinct and continued homosexual experience.

"18 percent of the males have at least as much of the homosexual as the heterosexual in their histories (i.e., rate 3-6) for at least three years between the ages of 16 and 55. This is more than one in six of the white male population." (p. 650).

Professor Kinsey concludes in his "*Report On The Male*" at p. 659:

> "In view of the data which we now have on the incidence and frequency of the homosexual, and in particular on its co-existence with the heterosexual in the lives of a considerable portion of the male population, it is difficult to maintain the view that psychosexual reactions between individuals of the same sex are rare and therefore abnormal or unnatural, or that they constitute within themselves evidence of neuroses or even psychoses."

Dr. Carl M. Bowman, and Bernice Engle in "*The Problem of Homosexuality*" at p. 9, state that "The large group of homosexuals contains many men of a particularly virile, masculine type, a number of whom go in for active sports and become noted athletes." Therefore, the term "homosexual" cannot be properly and validly identified except possibly by evidence of performance of a sexual act with a person of the same sex, and then only after determining with definiteness what motivated the sexual act since the majority of those who are actually caught in or who indulge in homosexual acts are actually bi-sexual.

According to the Post Office Department this large segment of our society as defined above by Professor Kinsey, in his "*Report On The Male*" would thereby be unconstitutionally reduced to second class citizenship. The Post Office Department would stamp any purchaser of our magazines as homosexuals. They would be discriminated against and prohibited from obtaining a magazine of their choice merely because of their personal characteristics which presumably set them apart, and not because they are guilty of any crime. Even if, assuming *arguendo*, that the Post Office Department was correct in this assumption, persons with homosexual inclinations are not *ipso facto*, criminals or detrimental to civilization, nor are they necessarily afflicted by disease, nor do they com-

prise a small proportion of the population which can be isolated and contained, nor is homosexuality as such intrinsically evil. Our Constitution does not state that only heterosexuals may receive and read the literature of their choice and homosexuals must read the same literature or be denied the right to view a magazine which interests them. To interpret our Constitution and this Court's definition of obscenity, in the manner that the Post Office Department has done, reduces a large segment of our society to second class citizenship. The Post Office Department's attempt to wipe out our magazines could not possibly end homosexuality. Dr. Blanche M. Baker in her introduction to Helen P. Branson's book *"Gay Bar"* states at p. 10: "Of one thing we can be sure: Like sex, homosexuality is here to stay. No amount of condemnation, criticism, entrapment or incarceration in penal and mental institutions can wipe out the fact of the existence of this tremendously large minority. There is so much secrecy connected with it that it is almost impossible to estimate the incidence of homosexuality."

This action of the Post Office Department represents nothing more than an attempt to enforce the prejudices of the predominant social and economic majority over a minority group in our population. The Post Office Department would set up dual standards in literature; what is acceptable to the prejudiced censors and what is unacceptable.

Homosexuality, as stated by Professor Kinsey, in his *"Report On the Male,"* p. 659:

> "In view of the data which we now have on the incidence and frequency of the homosexual, and in particular, on its co-existence with the heterosexual in the lives of a considerable portion of the male population, it is difficult to maintain the view that psychosexual reactions between individuals of the same sex are rare and therefore abnormal, or unnatural, or that they constitute within themselves evidence of neuroses or even psychoses."

And at page 666:

> "If all persons with any trace of homosexual history, or those who were predominantly homosexual were eliminated from the population today, there is no reason for believing that the incidence of the homosexual in the next generation would be materially reduced. The homosexual has been a significant part of human sexual activity ever since the dawn of history. Primarily because it is an expression of capacities that are basic in the human animal."

Homosexuality is not a disease, and it does not endanger the health of society. In the "*Report of the Departmental Committee on Homosexual Offenses and Prostitution*," United Kingdom Home Office and Scottish Home Department, 1957, we find at page 14:

> "On the criterion of symptoms, however, homosexuality cannot legitimately be regarded as a disease, because in many cases it is the only symptom and is compatible with full mental health in other respects. In some cases, associated psychiatric abnormalities do occur, and it seems to us that if, as has been suggested, they occur with greater frequency in the homosexual, this may be because they are products of the strain and conflict brought about by the homosexual condition and not because they are causal factors. It has been suggested to us that associated psychiatric abnormalities are less prominent, or even absent, in countries where the homosexual is regarded with more tolerance."

The British Report, at pp. 21-22, rejects the notion that homosexuality endangers the health of society. At p. 73, the Report recognizes the incidence of "Homosexuality in relatively intact personalities, otherwise well socialized. Many of these are valuable and efficient members of the community, quite unlike the common conception of the homosexual as being necessarily, or probably, vicious, criminal, effete or depraved."

Dr. Blanche M. Baker in her introduction to Helen P. Branson's book, "*Gay Bar*", at pp. 8 and 9, states:

> "I do not consider homosexuality to be a disease. Like Dr. Alfred Kiasey, I regard it as one of our mammalian heritages, of complex origins, so widespread in the animal kingdom that no serious student could consider it to be unnatural but merely a variation of commonly accepted sexual behavior. Any human being who suffers from pain, rejection by his fellows, overly strict authoritarian control, neglect or over-indulgence, may develop neurotic or even psychotic conditions and need psychiatric help. Homosexuals are no exception. Even the best natured dog, if kicked around enough, may snarl and bite back. I regard objectionable mannerisms and social conduct of 'queers' as neurotic expressions of their inward fears and hostilities and not due to their homosexuality per se. The rapidity with which such traits disappear in group therapy under the skilled guidance of trained non-critical leaders verifies this."

In the Post Office Department's interpretation of this Court's definition of obscenity, reason has given way to an illogical approach, characterized by blind prejudice, superstition, hatred and condemnation of non-conformity, and an illogical attempt to equate mores, morals and law. The Post Office Department would suppress such as Plato, Michelangelo, Leonardo da Vinci, all overt homosexuals. The Post Office Department expert witness condemns Exhibit III, the May 1960 issue of "Grecian Guild Pictorial" as an obscene magazine, aimed at homosexuals because of its title, "*Grecian Guild Pictorial*". All historians recognize that among the ancient Greeks homosexuality was an accepted outlet of the sexual drive of both men and women. No historian would assert that the strength of the Greek race nor the standards of its culture suffered thereby. Rather, the Greeks established a Golden Age of art and literature which successive generations have tried to emulate, but not the Greeks frank approach to sex. There is no evidence in history to support the premise that a nation will degenerate and decay unless homosexuality is stamped out of existence, which constitutes the

Post Office Department's great crusade. Summarizing this analysis of the Post Office Department's interpretation of this Court's definition of obscenity as set forth in the case of *Roth* v. *United States*, 354 US 476, we assert that the Post Office Department is unconstitutionally attempting to discriminate against and censor the literature of a minority group and that inherently the Post Office Department's definition of obscenity is too vague and indefinite to be constitutional. Carried to its extreme the Post Office Department's ban of our magazines is analogous to a puppy dog chasing his own tail; the magazines are obscene because they are purchased by homosexuals and who are homosexuals, the purchasers of the magazines.

C—*Application of this Court's Definition of Obscenity*

Appellants argue that these magazines must be judged according to their effects upon normal, healthy adults having applied contemporary community standards. The Post Office Department does not allow for a dissent in matters of taste. Petitioners' magazines are constitutionally protected even if they could be considered as hateful to the prevailing climate of public opinion; the case of *Roth* v. *United States*, 354 US 476, held that they would still have the constitutional protection of the First Amendment. This Court's negation of the archaic rule of *Regina* v. *Hicklin*, L.R. 3, QB 360, surely does not mean that a Gallup Poll must be conducted to determine the sexual habits of some 40,000 monthly purchasers of our magazines from newsstands all over the United States, nor may we consider the possible effect upon children or emotionally disturbed readers, illiterates, or particularly susceptible groups. If these magazines would not appeal to the prurient interest of an average, normal, adult they are not obscene and are constitutionally protected. Photographs portrayed in these magazines are, not better, and no worse than those portrayed in such leading magazines

as *Esquire*, *Gentry*, *Rogue*, *Duke*, and *Playboy* magazines which the Post Office would not dare to argue are obscene. A salacious reader who might purchase one of appellants' magazines from a book store is more likely to feel cheated than excited, compared with the numerous nudist magazines, such as *Sunshine and Health*, *Sun Life*, *Helios*, all containing photographic illustrations of entirely nude models with completely exposed genital area, and all of which are displayed for sale at the same newsstands carrying our magazines for sale. But the effect of these magazines on such erotic or abnormal readers does not set the constitutional limit on freedom of speech and press. At the hearing before the Post Office Department Judicial Officer, counsel for the Post Office Department urged that the intent of the publisher should control. Actually, the intent of the publisher is irrelevant herein, because it is the magazines themselves which the Court must base its decision upon, surrounding circumstances being irrelevant.

The Post Office Department attempted to prejudice our magazines as depraving children. This is refuted, (Record, pages forty-one and forty-three). If the publisher of appellants' magazines intended to corrupt the entire juvenile population of the United States by distributing to our younger set magazines containing photographic illustrations of "Mother Goose Rhymes" which the publisher might be of the opinion would appeal to the prurient interests of the Nation's children, the juvenile population of the United States still could not be corrupted since they would still only be receiving "Mother Goose Rhymes".

If all of appellant's magazines were so intended to be beamed at a homosexual audience, appellants' magazines could not be viewed as anything stronger than magazines containing male pin-up photographs (Record page forty-two). This Court surely will take judicial knowledge of the vast number of female pin-up photographs sold an-

nually in the United States, depicting completely nude female models with the genital area exposed. If this Court should cast aside appelants' argument that our magazines are physique, body building magazines, and hold our magazines are nothing more than magazines of male pin-up photographs intended for, and only purchased by homosexuals, then appellants argue to this Court that a homosexual purchaser of appellants' magazines, who pays his income taxes, and does not violate the laws of his Community, State and Nation, is not a second class citizen, and is entitled under our Constitution to purchase his own choice of pin-up photograph. It is quite possible that some photographs contained in appellants' magazines, might appeal to the erotic interest of a possible homosexual purchaser of the magazines, but this is quite different from appealing to a prurient interest of that same purchaser. This is analogous to a so-called heterosexual male person purchasing a nude pin-up photograph of Marilyn Monroe, hundreds of thousands of which appear upon walls all over the United States, which might possibly appeal to the erotic interest of the purchaser, and which is entirely different from the purchase of so-called hard core pornography, or a photograph depicting a model or models in a sexual act, which might possibly appeal to the prurient interest of the purchaser.

There are hundreds of thousands of people in the United States interested in physical development and body building. The huge success of the York Bar Bell Company testifies to this fact. Within our own City of Washington, D. C., there are as many persons attending Vic Tanney's Gymnasiums as attend Arthur Murray's Dance Studios. The President of the United States has selected Oklahoma University Athletic Director Bud Wilkinson to be Director of Physical Fitness for our Youth Corps. Physical development and body building have been popular in the United States for many years and magazines comparable to our magazines have been sold to persons interested in physical development and body building for

just as long a time, going back to Charles Atlas, Bernarr McFadden and Earl Lederman. (Record, pages forty-three, forty-four, forty-seven, forty-eight.) That our magazines are comparable to all the other physique magazines was admitted by the Post Office Department's expert witness. (Record, pages twenty-eight, twenty-nine). In all physique magazines, similar photographs of models are used as a necessary adjunct to the written text, as was also admitted by the Government witness. Therefore, if this Court should agree with the United States Court of Appeals for the District of Columbia, that our magazines must be viewed as physical culture, body building magazines then as such these magazines are constitutionally protected. The Court below apparently gave no consideration to the decisions of this Court in the cases of *Sunshine Book v. Summerfield*, 355 US 372; *Mounce* v. *United States*, 355 US 180. And especially *One, Inc.* v. *Olesen*, 355 US 371. The Post Office Department, the United States District Court for the District of Columbia, and the United States Court of Appeals for the District of Columbia placed the interpretation upon the last three mentioned decisions of this Court, which all followed this Court's decision in the case of *Roth* v. *United States*, 354 US 476, that no one knows what this Court intended to say in the last three cases decided. Appellants have argued, at all three hearings below, that this Court, through its decisions in these three cases, intended that all ideas, containing even the slightest amount of socially redeeming value, and though they may be contrary to prevailing public opinion, are constitutionally protected. Our body building, physique magazines, admittedly appealing to a minority of our population are also protected by our Constitution. We admit, that by number, the persons interested in body building are a minority group. The total number of applicants to our national "Mr. America" contest is infinitesmal compared to the total male population of the United States of America. Yet, this minority group has a constitutional right to receive

the magazine in which they have an interest, through the United States Postal Service, regardless of what effect these magazines might have upon any other minority group, and we have a constitutional right to distribute these magazines. It would be impossible to produce any magazine which does not have some appeal to some particularly susceptible groups, such as "homosexuals", as heretofore defined. There is a myriad of every day stimuli, which would appeal to the prurient interest of this minority group of "homosexuals," while the same stimuli would have no effect on other members of the same group. (Record, pages twenty thru twenty-three, twenty-five). No witness is qualified to testify as to what features of our magazines would appeal to the majority of "homosexuals", even if the witness knew with certainty the people who purchased our magazines from newsstands. Of course, this would require the witness to conduct a detailed examination into the sex life of each and every one of our 40,000 monthly purchasers. Our magazines are sold principally through newsstands and bookstores all over the United States, the same method of distribution that is used by practically every other magazine of consequence sold in the United States.

POINT II

Whether appellants' magazines are non-mailable as containing advertisements of where, how, from whom, and by what means obscene material may be obtained in violation of Title 18, Section 1461, United States Code.

This Court in its decision in the case of *Smith* v. *California*, 361 U.S. 147, made it quite clear that no owner of a book store is to be held responsible for having for sale, or selling, obscene literature if that book dealer had no knowledge of the obscene nature of his merchandise. By analogy, appellants contend that no publisher of books or magazines is responsible for the unknown

actions of the people who advertise in his books or magazines. In our case there is no evidence that our publisher knew any contributing photographer was advertising the sale of obscene material. But rather, the evidence showed that we tried to avoid such contributing photographers by following the same procedures, practiced by the Post Office Inspectors, of sending "test letters". The Postal Inspector testified, (Record, page fifty-seven), that he would have difficulty in obtaining pornographic material from the "type of dealers." However, this same Postal Inspector, whose duty it is to investigate for violations of Title 18, U.S. Code, Section 1461, did not purchase any obscene material from any of the advertisers in our magazines. Actually, the obscene photographs which were introduced in evidence at the Post Office hearing, were seized from different photographers, at their studios, pursuant to search warrants and arrest warrants based upon violation of local State statutes prohibiting possession and sale of obscene material and not pursuant to any charge of violation of Title 18, U.S. Code, Section 1461, using the United States Postal Service to convey obscene materials. The Post Office Department, without any regard for fair play, attempted to connect an outside activity of our then publisher, Mr. Womack, doing business as Continental Artists, to our magazines. No where in any of our magazines has there ever appeared any reference to, or advertisement of Continental Artists, (Record, page fifty-six).

Actually, the testimony showed, (Record pages fifty-eight, through sixty-two), that our publisher inquired of the Postal Inspector and offered to delete from our magazines the work of any photographer who had been convicted of using the United States Postal Service to distribute obscene materials. Further, our then publisher, in his own efforts to ascertain the nature of the photographs sold by the advertisers in our magazines, voluntarily cancelled the advertisements of several photogra-

phers who were using the United States Postal Service for distribution of obscene materials, prior to the illegal activities of these photographers being discovered by the Postal Inspector. We have exercised all precautionary measures available to us in an attempt to comply with Title 18, Section 1461, United States Code. The record clearly indicates that appellants had no knowledge of any alleged illegal activities of any contributing photographer or advertiser in our magazines and, therefore, under the doctrine of *Smith* v. *California*, 361 U.S. 147, we should not be held accountable for the unknown actions of the advertisers in our magazines. To rule that our magazines are non-mailable, based upon the record in this case, would set a dangerous precedent requiring every magazine publisher to first purchase, through the United States Postal Service, samples of the products advertised for sale, through the United States Postal Service, in that publisher's magazine. Assuming that a publisher was to follow this policy, as was followed by the publisher of our magazines, based upon the testimony of the Postal Inspector, a series of purchases would be required, the cost would be prohibitive and there would be no guarantee that at a subsequent date the photographer would not alter his material offered for sale through the Postal Service and proceed to distribute obscene material.

POINT III

Whether the appellee, through the Post Office Department procedures, exercised an unconstitutional prior restraint upon appellants' magazines in violation of the First and Fifth Amendments to the Constitution of the United States of America.

Appellants assert that the administrative procedures followed by the Post Office Department, based upon a criminal statute, raises doubts of constitutionality. The fragile foundation on which the Post Office action rests

must be kept in mind, both in dealing with the substantive obscenity question involved and in determining the proper scope of judicial review. It is the duty of the Courts to defend substantive Constitutional rights especially when attacked from a source itself of doubtful Constitutional validity. There is lacking here the kind of specific legislative direction to the administrative agency that in certain circumstances justifies judicial deference to administrative determinations. It is the magazines before this Court that are on trial, not the publishers, although the Post Office Department has taken the contrary view, by attempting to unconstitutionally prohibit from the mails any magazine in which Herman L. Womack was interested.

The Post Office Department conducted an unconstitutional prior restraint on these magazines. It first held the magazines to be non-mailable without notice or hearing allowed the publishers and deprived the appellants the use of the mails. After pressure exerted by the United States District Court, at the instance of the appellants in Civil Action No. 1082-60, United States District Court for the District of Columbia, the Post Office Department held a time consuming hearing, the product of which was an Order contrary to the established law of the United States, which Order based upon the grounds given could have been propounded without any hearing at all. This amounts to the most obnoxious and unconstitutional censorship. The principal effect of the administrative hearing at the Post Office Department is to delay action of the Courts; it is no more than me arguing with myself over what I had already decided to do. The Judicial Officer of the Post Office could not possibly qualify as an administrative expert. Appellants assert that the Post Office Department conducted an ex parte administrative prior restraint treading upon an area of constitutional sensitivity apart from the substantive problems of determining whether or not the magazines are obscene.

All issues of appellants' magazines are dated. They are prepared and delivered to the newsstand dealers and bookstores for sale prior to the current month. The General Counsel of the Post Office Department is not a qualified expert on the subject of what material, considered as a whole, applying contemporary community standards, would appeal to the prurient interest of the purchasing public in our fifty States. Actually, as appellants interpret the decisions of this Court, only a jury would be so qualified. When the General Counsel of the Post Office Department reviews, at his leisure, questioned magazines which have already been withheld from transit through the United States mail, dated magazines become obsolete. Upon the General Counsel of the Post Office Department concluding his *ex parte* determination that a magazine is obscene and non-mailable, a letter is delivered to the publisher of the magazine informing that publisher of the General Counsel's decision and offering the option to the publisher to elect to voluntarily withdraw the questioned magazines from the United States Postal Service or allow their destruction. The magazine publisher then may exercise the alternative of retaining counsel and filing a petition with the Post Office Department, contravening the determination of the General Counsel of the Post Office Department, and requesting a hearing on the merits. Meanwhile, time marches on, and by the nature of the rules adopted by the Post Office Department that month's issue of the magazine becomes obsolete before a hearing examiner is even assigned to try the case. The publisher has just lost one month's income from the sale of his magazines, the Internal Revenue Service has lost one month's income taxes from the publisher, and the reading public has been denied their Constitutional right to purchase and read a magazine of their choice. Appellants in the case at bar, decided to test these unconstitutional procedures; therefore, upon receipt of notice of the General Counsel for the Post Office Department's determina-

tion that our magazines were obscene and non-mailable, a complaint praying for a temporary restraining order and preliminary injunction was filed in the United States District Court for the District of Columbia in Civil Action No. 1082-60, as a result of which the United States District Court for the District of Columbia gave the Post Office Department two weeks in which to conclude all administrative proceedings to determine the mailability of our magazines. After receipt of the Temporary Restraining Order, on April 14, 1960, the General Counsel for the Post Office Department then filed a complaint with the Post Office Department alleging that appellants' magazines were obscene and nonmailable, and later amended that complaint to include a charge that appellants' magazines were nonmailable, in that they contained advertisements where, how, and from whom, obscene material may be obtained. (Record page three). Pursuant to the rules of the Post Office Department, the administrative hearing before one of the Post Office Department hearing examiners, the rendering of a decision by the hearing examiner, the appeal from that decision to the Post Office Department Judicial Officer, and the rendering of a decision by the Post Office Department's Judicial officer would have consumed approximately two months if all parties acted expeditiously. To expedite the administrative procedures, and to allow the Post Office Department to comply with the Order of the United States District Court for the District of Columbia, the appellants stipulated to waive the hearing before a Post Office Department hearing examiner and the appeal from his decision, and consented to the Post Office Department Judicial Officer presiding at the hearing with the final decision of the Post Office Department Judicial Officer exhausting all administrative appeals and remedies. These actions of the Post Office Department appellants assert constitute an unconstitutional prior restraint on our magazines amounting to postal censorship which this Court should never allow.

CONCLUSION

Appellants assert that the magazines in question are not obscene, when tested by this Court's definition of obscenity. Further, appellants assert that the Post Office Department's interpretation of this Court's definition of obscenity is inherently vague and indefinite. Further, appellants assert that even if the Post Office Department's definition of obscenity was applicable to these magazines, as magazines beamed at homosexuals, the magazines would still be constitutionally protected. Appellants assert that these magazines are physique, body-building magazines, and as such, are constitutionally protected. Appellants assert that no magazine publisher should be held responsible for the unknown actions of the contributing photographers and advertisers in any magazines. Appellants assert that this Court should not allow the unconstitutional procedures of the Post Office Department, amounting to a prior restraint upon these magazines, to stand. Therefore, appellants conclude that this Court should hold these magazines to be not obscene and mailable and reverse the decision of the United States Circuit Court of Appeals for the District of Columbia with an Order to the United States District Court for the District of Columbia to grant the appellants' prayers contained in their complaint for injunctive relief, and order the Post Office Department to accept for mailing the appellants' magazines.

Respectfully submitted.

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